In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 57

VICENTE MORENO, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 26-31) is reported at 118 C. Cls. 30.

JURISDICTION

The judgment of the Court of Claims was entered on November 7, 1950 (R. 32). Petitioner's motion for a new trial was overruled on Janu-

ary 9, 1951 (R. 32). By order of the Chief Justice, the time for filing a petition for a writ of certiorari was extended to May 10, 1951 (R. 32). The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1255 (1).

QUESTION PRESENTED

Whether the Court of Claims properly refused to set aside the Army Department's determination as to petitioner's military status and his non-eligibility for additional pay and allowances under the Missing Persons Act, where the Act expressly provides that the administrative determination "shall be conclusive" and where, assuming reviewability, the court found the determination to be neither arbitrary nor capricious.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Missing Persons Act (Act of March 7, 1942, 56 Stat. 143, as amended, 50 U.S.C. App. 1001, *et seq.*) are set forth in the Appendix, *infra,* pp. 13-17.

STATEMENT

The Missing Persons Act provides that any person in active service who is officially determined to be absent in a status of (1) missing, (2) missing in action, (3) interned in a neutral country, (4) captured by an enemy, or (5) beleaguered or besieged, is for the period he is officially determined to be in such absent status entitled to receive or have

credited to his account the same pay and allowances to which he was entitled at the beginning of such period of absence. *Infra,* p. 13. This case arises out of petitioner's claim under the Act for Army pay and allowances. The facts involved, as found by the Court of Claims (R. 18-26), may be summarized as follows:

Petitioner, a native of the Philippine Islands, was ordered to active duty on February 8, 1942, as a Second Lieutenant in the Philippine Scouts, a branch of the Army of the United States (R. 18-19, 26). The Philippines were besieged by the Japanese at that time and petitioner was taken prisoner by the Japanese Army on April 9, 1942 (R. 19). He was imprisoned on the Islands until June 28, 1942, when he obtained a release on parole by signing an "oath" to his captors (R. 19-20). He was not thereafter "confined or imprisoned by the Japanese, but was permitted to go at liberty to live with his family and to engage in business or private employment" (R. 22).

Petitioner accordingly returned home to live with his family in the Philippines (R. 20). He remained there until he recuperated from diseases he had contracted during his imprisonment (R. 20). In September 1942, having become strong enough to work, petitioner moved elsewhere in the Philippines where he lived with friends and worked at harvesting rice (R. 20). On April 10, 1943, he went to still another place in the Philip-

pines where he took employment as chief watchman for the "NARIC (National Rice and Corn Corporation) ", a corporation set up by the Imperial Japanese Government in its occupation of the Philippines (R. 20). The corporation later promoted petitioner to the position of purchaser in charge of its buying station (R. 20). He held this position until October 31, 1944 (R. 20).

At the beginning of his employment by the NARIC, petitioner joined a local unarmed guerrilla band which was in an inactive status (R. 20). In April 1944, this inactive guerrilla group disbanded (R. 20). Petitioner joined another unarmed local guerrilla unit on October 31, 1944, and remained associated as an officer with this unit, which was engaged in intelligence work, until January 28, 1945 (R. 20). Neither of these guerrilla units was authorized or approved by the American Army authorities (R. 20). Nor had petitioner ever been requested or authorized by any "recognized guerrilla commander to accept employment with the Japanese controlled" NARIC (R. 20).

On January 28, 1945, after the American Army had recaptured the Philippines, petitioner returned to American military control (R. 20). Subsequently, in December 1945, Army Headquarters for the Western Pacific Forces approved a recommendation that petitioner's "activities during the Japanese occupation of the Philippines did not constitute an abandonment of loyalty to the United

States and that he be retained in service" (R. 21).

In order to determine petitioner's eligibility under the Missing Persons Act for pay and allowances for the period between his capture and return to military control, the Army Department made several determinations as to his status under the Act (R. 22). These determinations consistently held petitioner to be entitled to pay and allowances for (1) the period from February 8, 1942 (when he was ordered to active duty in the Philippines which were then besieged by the Japanese Army) to April 9, 1942 (when he was captured), on the ground that he was then in a besieged status; (2) for the period of his imprisonment, that is, from April 9, 1942 to June 28, 1942, when he was released by the Japanese; and (3) for the period from June 28, 1942 to September 30, 1942, when he was living at home with his family and recuperating from the diseases contracted while imprisoned. However, with respect to the period from October 1, 1942 to January 27, 1945 [1] (when petitioner returned to American military control), the Army Department, after an initial conflicting determination, ruled petitioner ineligible for pay and allowances under the Missing Persons Act (R. 22, 27). This latter period included the period from October 1, 1942 to April 10, 1943, when he worked at harvesting rice (R. 20) and the period

[1] Although the findings of fact refer to January *1*, 1945, the correct date, as shown by the petition filed in the Court of Claims, is January *27*, 1945 (R. 5).

from April 10, 1943 to October 31, 1944, when he was employed by the NARIC (R. 20). *Supra*, pp. 3-4. On April 28, 1948, Army Headquarters in the Philippines, which had been delegated "authority for final action in cases of this nature", affirmed the correctness of the determination that petitioner was not entitled to pay and allowances "for the period from October 1, 1942 to January 27, 1945" (R. 4-5).

On July 23, 1948, petitioner filed suit in the Court of Claims for that pay (R. 1).[2] He alleged that "the United States Army authorities have wrongfully and without cause and in violation of [the Missing Persons Act] denied plaintiff's claim for his back pay" in the sum of $10,000 (R. 4, 5). The United States answered by denying each and every allegation of the petition (R. 17). After a hearing, the Court of Claims, upon the basis of its special findings of fact summarized above, concluded that petitioner is not entitled to recover (R. 26). The court recognized that the Missing Persons Act makes the Departmental determinations as to status of an individual under that Act and his entitlement to pay and allowances conclusive (R. 30). Pointing out, however, that even if the Act must be read so as to allow "suit to be brought if the departmental denial of the claim was arbitrary

[2] The petition filed in the Court of Claims is actually limited to a request for pay for the period from April 1, 1943 to October 15, 1944 (R. 4). The Court of Claims, however, was of the view that the period involved was October 1, 1942 to January 1, 1945 (R. 27).

and capricious", the court ruled that there was "no ready answer" to the question of petitioner's status in this case and that "it cannot be said that the answer which the department gave was arbitrary and capricious" (R. 31).

ARGUMENT

The decision of the Court of Claims is clearly correct, does not present the question to which petitioner's argument is chiefly directed and, we submit, does not require review by this Court.

1. Petitioner's chief contention is that the Court of Claims "is confused as to its jurisdiction under the Administrative Procedure Act" (Pet. 5) and that it erred in declining to assume jurisdiction to review his claim for benefits under the Missing Persons Act. The short answer to this contention is (1) that the Administrative Procedure Act is not applicable, and (2) that the court, despite its lack of power to review under that Act, actually did review petitioner's claim.

a. The Administrative Procedure Act expressly excludes from its coverage the type of claim here involved. Apart from any other reason as to the Act's inapplicability, it is significant that Section 2 (60 Stat. 237, as amended, 5 U.S.C. 1001) specifically excludes "from the operation" of the Act [3]

[3] The only exception to this exclusion from the operation of the Administrative Procedure Act relates to the public information requirements, which are in no way pertinent here. See Secs. 2 and 3, 60 Stat. 237, 238, 5 U.S.C. 1001, 1002.

all "functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947." In enacting the Missing Persons Act, upon which petitioner's "claim is based" (R. 27), Congress provided that the Act "shall remain in effect until the termination of the present war with Germany, Italy, and Japan, and for twelve months thereafter, or until such earlier time as the Congress by concurrent resolution or the President by proclamation may designate." (Sec. 15, 56 Stat. 147, 1093, 50 U.S.C. App. 1015).[4] This termination provision means, of course, that the operative provisions of the Administrative Procedure Act, including the judicial review provisions of Section 10 relied on by petitioner (Pet. 20-25), are not applicable to functions exercised by the Army Department under the Missing Persons Act. See *Attorney General's Manual on the Administrative Procedure Act* (1947), p. 12.

b. The Government does not concede that the Missing Persons Act contemplates any court review of administrative determinations under the statute which, by the provisions of Section 9, are made "conclusive" (R. 30). The issue is presently being litigated and may be presented for the Court's consideration, if necessary and desirable, in an ap-

[4] Excluded from this termination provision of the Missing Persons Act are certain sections of that Act dealing with income tax benefits for servicemen, the Civil Service Retirement Act and other subjects not here material.

propriate case. Here, however, the issue is not properly involved since, contrary to petitioner's assertion, the court below did review the Army determination after trial of the case on the merits. It was only then that the court, assessing its factual findings against the Army determination, concluded that the problem confronting the Army was a difficult one, that there was "no ready answer to it", and that "it cannot be said that the answer which the department gave was arbitrary and capricious" (R. 31). Obviously, if the court below had not exercised a right of review, it would have been in no position to conclude that the Army determination was neither arbitrary or capricious and that it should not therefore be set aside. Thus, the ruling of the court below, far from manifesting a denial of jurisdiction to review, accords fully with the standard of review traditionally applied by the courts in cases in which review is appropriate. *Silberschein* v. *United States,* 266 U.S. 221, 225; *United States* v. *Williams,* 278 U.S. 255, 257-258; *Meadows* v. *United States,* 281 U.S. 271, 274; *Dismuke* v. *United States,* 297 U.S. 167, 172.

c. Furthermore, the facts found by the court below not only confirm the reasonableness of the Army determination, but show that any other determination would have been improper.[5] The only

[5] Although it is the reasonableness, and not the correctness, of the administrative determination which is in issue in those cases where judicial review is appropriate, the facts found by the court below establish, we submit, not only the reasonableness of the Army determination but its correctness as well.

period for which additional Army pay and allowances are sought is from October 1942 to January 1945.[6] But, during almost that entire period, petitioner was gainfully employed in a civilian occupation in the Philippines. In September, 1942, he started to work at harvesting rice (R. 20). In April, 1943, he took a job with the NARIC, a corporation created by the Japanese puppet government in the Philippines (R. 20). Indeed, the record shows that petitioner's employment with the NARIC led to his promotion to the position of purchaser in charge of one of the corporation's buying stations (R. 20). Since petitioner was actively employed and earning a livelihood during that period, there is little equity in a contention that the Government is obligated to pay him full military pay and allowances for that same period.[7]

One additional consideration emphasizes the correctness of the Army determination. Petitioner, as already stated, was employed by a Japanese puppet corporation from April 1943 through October 1,

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[6] Petitioner received Army pay and allowances from February 8, 1942 through September, 1942, by which time he had recovered from the diseases contracted while imprisoned by the Japanese. *Supra*, p. 5.

[7] Compare the cases holding that even where a Government employee is wrongfully discharged, he is not entitled to full Government pay and allowances for the period of his wrongful removal from service if he was gainfully employed in private industry during that period. *Borak* v. *United States*, 110 C. Cls. 236, 247, certiorari denied, 335 U.S. 821; see Act of June 10, 1948, 62 Stat. 354, 5 U.S.C., Supp. III, 652 (b) (3). See also *Kelly* v. *State Personnel Board*, 31 Cal. App. 2d 443; *Corfman* v. *McDevitt*, 111 Colo. 437; *State ex rel. Dresskell* v. *Miami*, 153 Fla. 90.

1944 (R. 20). While there can be no doubt that Japanese occupation of the Philippine Islands involved detailed control over Philippine life,[8] it would be hard to impute to Congress an intent to allow full military pay and allowances to those who, like petitioner, took paying jobs with Japanese puppet agencies during the occupation. It is appropriate to note in this connection that the War Claims Commission Act (62 Stat. 1240, 50 U.S.C App., Supp. III, 2001), in providing for the payment of detention benefits to American civilians who were captured and interned by the Japanese on the Philippines, expressly excepts from the scope of the Act any civilian "who at any time voluntarily * * * in any manner served [the Imperial Japanese] government" (62 Stat. 1242, 50 U.S.C. App., Supp. III, 2004 (a). It seems obvious that a Congressional policy which excludes American civilians from receiving any special detention benefits if they served the Japanese Government, must necessarily preclude payments of benefits by the United States to soldiers in the Philippines who were not detained and took jobs with the Japanese Government or with corporations created by it.[9]

[8] Recto, *Three Years of Enemy Occupation: The Issue of Political Collaboration in the Philippines* (1946), pp. 10-14.

[9] Petitioner's reliance on the documents issued by General Wainwright on May 7, 1942 (Pet. 8) and by Colonel Hilsman on May 11, 1942 (Pet. 9), directing surrender of the American forces to the Japanese, warrants no different result. While the materiality of these documents is highly questionable, it is obvious that they can be of no aid to petitioner because he surrendered to the Japanese on April 9, 1942 (R. 19), *before* the documents were issued.

2. Petitioner also urges that the court below should have reviewed the Army determination involved here because it deprived him of his "soldier's contractual right for his pay" (Pet. 14). Essentially, however, a soldier's right to pay is statutory. In any event, no matter what the source of the right, it is clear that it must here be measured by the Missing Persons Act through which Congress has provided a comprehensive substantive and procedural system for determining when and under what circumstances a soldier's pay should continue while he is beyond military control.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

HOLMES BALDRIDGE,
Assistant Attorney General.

SAMUEL D. SLADE,
MORTON HOLLANDER,
Attorneys.

JUNE, 1951.

APPENDIX

The Missing Persons Act (Act of March 7, 1942, 56 Stat. 143, as amended, 56 Stat. 1093, 58 Stat. 679, 50 U. S. C. App. 1001, *et seq.*) provides in pertinent part:

> SEC. 2. Any person who is in active service and who is officially determined to be absent in a status of missing, missing in action, interned in a neutral country, captured by an enemy, beleaguered or besieged shall, for the period he is officially carried or determined to be in any such status, be entitled to receive or to have credited to his account the same pay and allowances to which he was entitled at the beginning of such period of absence or may become entitled thereafter, and entitlement to pay and allowances shall terminate upon the date of receipt by the department concerned of evidence that the person is dead or upon the date of death prescribed or determined under provisions of section 5 of this Act: *Provided,* That such entitlement to pay and allowances shall not terminate upon expiration of term of service during absence and in case of death during absence shall not terminate earlier than the dates herein prescribed: *Provided further,* That there shall be no entitlement to pay and allowances for any period during which such person may be officially determined absent from his post of duty without authority and he shall be indebted to the Government for any payments from amounts credited to his account for such period.

SEC. 6. When it is officially reported by the head of the department concerned that a person missing under the conditions specified in section 2 of this Act is alive and in the hands of an enemy or is interned in a neutral country, the payments authorized by section 3 of this Act are, subject to the provisions of section 2 of this Act, authorized to be made for a period not to extend beyond the date of the receipt by the head of the department concerned of evidence that the missing person is dead or has returned to the controllable jurisdiction of the department concerned. When a person missing or missing in action is continued in a missing status under section 5 of this Act, such person shall continue to be entitled to have pay and allowances credited as provided in section 2 of this Act and payments of allotments, as provided in section 3 of this Act, are authorized to be continued, increased, or initiated.

SEC. 9. The head of the department concerned, or such subordinate as he may designate, shall have authority to make all determinations necessary in the administration of this Act, and for the purposes of this Act determinations so made shall be conclusive as to death or finding of death, as to any other status dealt with by this Act, and as to any essential date including that upon which evidence or information is received in such department or by the head thereof. The determination of the head of the department concerned, or of such subordinate as he may

designate, shall be conclusive as to whether information received concerning any person is to be construed and acted upon as an official report of death. When any information deemed to establish conclusively the death of any person is received in the department concerned, action shall be taken thereon as an official report of death, notwithstanding any prior action relating to death or other status of such person. If the twelve months' absence prescribed in section 5 of this Act has expired, a finding of death shall be made whenever information received, or a lapse of time without information, shall be deemed to establish a reasonable presumption that any person in a missing or other status is no longer alive. Payment or settlement of an account made pursuant to a report, determination, or finding of death shall not be recovered or reopened by reason of a subsequent report or determination which fixes a date of death except that an account shall be reopened and settled upon the basis of any date of death so fixed which is later than that used as a basis for prior settlement. Determinations are authorized to be made by the head of the department concerned, or by such subordinate as he may designate, of entitlement of any person, under provisions of this Act, to pay and allowances, including credits and charges in his account, and all such determinations shall be conclusive: *Provided,* That no such account shall be charged or debited with any amount that any person in the lands

of an enemy may receive or be entitled to receive from, or have placed to his credit by, such enemy as pay, wages, allowances, or other compensation: *Provided further,* That where the account of any person has been charged or debited with allotments paid pursuant to this Act any amount so charged or debited shall be recredited to such person's account in any case in which it is determined by the head of the department concerned, or such subordinate as he may designate, that payment of such amount was induced by fraud or misrepresentation to which such person was not a party. When circumstances warrant reconsideration of any determination authorized to be made by this Act the head of the department concerned, or such subordinate as he may designate, may change or modify a previous determination. Excepting allotments for unearned insurance premiums, any allotments paid from pay and allowances of any person for the period of the person's entitlement under the provisions of section 2 of this Act to receive or have credited such pay and allowances shall not be subject to collection from the allottee as overpayments when payment thereof has been occasioned by delay in receipt of evidence of death, and any allotment payments for periods subsequent to the termination, under this Act or otherwise, of entitlement to pay and allowances, the payment of which has been occasioned by delay in receipt of evidence of death, shall not be subject to collection from the allottee or charged against the pay of the deceased per-

son. The head of the department concerned, or such subordinate as he may designate, may waive the recovery of erroneous payments or overpayments of allotments to dependents when recovery is deemed to be against equity and good conscience. In the settlement of the accounts of any disbursing officer credit shall be allowed for any erroneous payment or overpayment made by him in carrying out the provisions of this Act, except sections 13, 16, 17, and 18, in the absence of fraud or criminality on the part of the disbursing officer involved, and no recovery shall be made from any officer or employee authorizing any payment under such provisions in the absence of fraud or criminality on his part.

SEC. 15. This Act, except sections 13, 16, 17, and 18, shall be effective from September 8, 1939, and shall remain in effect until the termination of the present war with Germany, Italy, and Japan, and for twelve months thereafter, or until such earlier time as the Congress by concurrent resolution or the President by proclamation may designate.

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